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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

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J. E. STEVENS AND McKAY STEVENS,
Petitioners,

vs.

SINCLAIR REFINING COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MORGAN M. MOULDER,
BRADSHAW & FIELDS,
Counsel for Petitioners.

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vs.

SINCLAIR REFINING COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, J. E. Stevens and McKay Stevens, respectfully show as grounds for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

A.

Summary Statement of the Material Involved.

This is an action for damages resulting from the destruction by fire of petitioners' building and the contents thereof located in Camden County, Missouri.

The case was originally filed in the State Circuit Court of Camden County, Missouri. Upon application of the respondent, the cause was removed to the District Court

of the United States for the Central Division of the Western District of Missouri.

Upon the trial of the case, a verdict and judgment were entered for the petitioners, awarding them damages in the aggregate sum of five thousand two hundred fifty dollars ($5,250). Of this amount, four thousand dollars ($4000) was for the destruction of the building and one thousand two hundred fifty dollars ($1,250) for the destruction of the contents thereof (R. 60).

This judgment was reversed outright on respondent's appeal to the United States Circuit Court of Appeals for the Eighth Circuit on the theory that the District Court should have sustained respondent's Motion for Judgment on the Pleadings. The record of the evidence was never brought up to the Circuit Court of Appeals.

The petitioners, J. E. Stevens and his wife, McKay Stevens, were residents of Camden County, Missouri, where they owned a tract of land adjacent to a state highway near the Lake of the Ozarks (R. 19). In January, 1939, the petitioners were engaged in constructing a store building on this land, a portion of the building being set aside for use as an oil and gasoline service station for the sale of petroleum products. Early in 1939 the petitioners entered into an agreement to handle respondent's petroleum products at this station upon its completion (R. 19-20).

As a part of this agreement the respondent oil company prepared, and the petitioners executed, a "Lease Agreement" whereby the petitioners' property was leased to the respondent (R. 39). On a prepared form supplied by the respondent oil company, the parties then signed a "Dealers Permit" whereby the respondent permitted petitioners to operate a service station on their own property (R. 43).

At the same time the respondent entered into an "Equipment Rental Agreement" whereby "Sinclair (respondent) hereby hires and rents to Customer (petitioners) and agrees to deliver to Customer's place of business, such equipment as Sinclair may from time to time deem necessary" (R. 35).

All three of these instruments were executed by the same parties on the same day as a part of the same transaction. These three instruments prepared by the Sinclair Oil Company contained provisions purporting to release and indemnify the oil company from any liability for its own acts of negligence *in installing* the equipment. They did not contain any provision releasing the oil company from liability for its negligence while engaged *in repairing* the equipment.

After the cause was transferred to the United States District Court, the petitioners were permitted to amend their petition (R. 19). The amended petition alleges the ownership of this property by the petitioners; the construction of the building and the use of a portion of it as a gasoline service station; and that an agreement was entered into with the respondent to sell respondent's petroleum products (R. 19). The amended petition then pleads that during the months of May and June of the year 1939 the respondent delivered to and installed on petitioners' premises in the manner and at the places where respondent deemed proper certain gasoline service station equipment "and electrical equipment used in connection therewith" (R. 20). The amended petition also alleges "that after said equipment was installed and had been operating for several days", the respondent made certain alterations in the wiring; that the respondent instructed the petitioners that if the equipment developed any trouble, the petitioners were not to fix it themselves or hire other workmen but

were to notify the respondent. The amended petition pleads that on July 6, 1939, the representative and duly authorized agent of the respondent informed petitioners that the equipment had not been properly installed but again warned petitioners against employing a local electrician; that the respondent's agent at this time told the petitioners that there was no danger and that the respondent would "make the necessary replacements and repairs and that there was no danger to plaintiffs' property from the conditions then existing"; that petitioners believed these statements, that the respondent knew they believed them, and that by reason thereof the petitioners failed to employ local electricians to correct the defective wiring.

The amended petition then alleged:

> "8. That wholly disregarding its duty to exercise due care in the installing, *repairing* and altering of said equipment, said defendant carelessly and negligently installed, repaired and altered said equipment as hereinabove pleaded, and that such negligence was, in part, as follows, to-wit:
>
> "A. the defendant failed to install . . .
>
> "B. the defendant failed to install . . .
>
> "C. the defendant failed properly to connect and insulate the exposed wires leading from plaintiffs' building to the motors located in defendant's pumps and failed to properly tape and insulate the exposed wires and failed to make a proper connection between said wires and the motors in defendant's pumps; and
>
> "D. the defendant failed to provide . . .
>
> "E. the defendant failed to install . . .
>
> "F. the defendant . . . thereafter located . . .
>
> "that as the direct and proximate result of the above enumerated acts of negligence the electrical equipment

used in operating said pumps became overheated, thereby producing a fire on plaintiffs' premises on the 18th day of July, 1939; and"

Several defenses not material to a determination of the issues involved in this certiorari were set up in the respondent's answer filed in the District Court. Among other things, the respondent pleaded the execution of the three instruments above referred to, that is, (1) Lease Agreement, (2) Dealers Permit and (3) Equipment Rental Agreement (R. 26), and the respondent alleged that by virtue of these agreements the petitioners had "agreed to indemnify, protect and save harmless" respondent from any loss, damage or injury "whether caused by any defect in the construction or installation of said equipment, or by the use, operation or maintenance of the same, whether due to the negligence of defendant or otherwise" (R. 26-31). At no time was there any claim that these instruments released the respondent from liability for its negligence in voluntarily assuming the duty imposed upon the petitioners to repair this equipment. The answer does plead that if the loss occurred as alleged in the amended petition, "such loss was caused solely by their (petitioners) own negligence in failing to maintain in good condition and repair the said wires, cables, conduits, breather pipes and other electrical appliances and their connections" (R. 32).

The petitioners filed their reply, wherein they admitted the execution of the instruments referred to as (1) Lease Agreement, (2) Dealers Permit and (3) Equipment Rental Agreement. The reply then pleaded that although these instruments did not impose upon respondent the duty of making the repairs, yet the respondent voluntarily assumed the duty and "in so assuming to install and alter said equipment, the defendant was guilty of active and positive acts of negligence in that it installed, repaired and

altered said equipment in a careless, unworkmanlike and dangerous manner . . . " (R. 52).

The respondent then filed a Motion For Judgment on the Pleadings. This motion was overruled and the District Judge filed the following memorandum (R. 55):

Order Overruling Motion of Defendant for Judgment on Pleadings.

This cause is pending upon motion for judgment on the pleadings. The parties have collaborated in so framing the (pendings) that the issue of law involved is clearly presented. Such action is to be commended.

The defendant's motion for judgment on the pleadings presents the question of whether the contracts entered into between the parties bar plaintiff's action. Without a detailed recitation of the facts, the answer to the question presented may be stated as follows:

The law of Missouri recognizes a sharp distinction between nonfeasance and misfeasance, the latter sometimes being characterized as active negligence. It is equally well recognized in Missouri that one may not contract against liability arising from his own negligence. The negligence charged in the petition is active negligence—misfeasance as distinguished from nonfeasance. It is predicated upon the legal theory that a party who does not owe the duty of inspection and repair under the law or by contract will nevertheless be liable for his negligence, if, regardless of his lack of obligation to make repairs, he nevertheless does so and in the performance of the operation so negligently does the work that injury results. The contract relieving the party from the obligation to do the work is no defense to the negligent act which causes the injury.

The distinction between misfeasance and non-feasance

was drawn by this Court in Franklin vs. May Department (fol. 55) Stores Co., 25 F. Supp. 735. While this Court is not bound by that ruling, it is bound by the rule announced in Lahtinen vs. Continental Bldg., Co., 97 S. W. (2nd) 102.

For the reasons stated the motion for judgment on the pleadings is denied.

J. C. Collet,
District Judge.

Dated this 26th day of June, 1940.

After judgment was entered by the District Court upon the jury's verdict for the present petitioners, the respondent appealed the case to the Circuit Court of Appeals for the Eighth Circuit.

In this appeal the respondent did not bring up the record of the testimony, but confined itself to the argument that it was entitled to a judgment on the pleadings. The Court of Appeals sustained the respondent in this contention and on November 5, 1941, reversed the judgment outright with instructions to enter judgment on the pleadings for the respondent. In reversing this case the Court of Appeals proceeded upon the following theory: (1) it held that the petition alleges negligence on the part of the respondent while engaged in *installing* the equipment, but also held that the above mentioned instruments entered into by the parties constituted a release and indemnifying arrangement relieving the respondent of any liability for negligence in installing the equipment; (2) it did not hold that these agreements released the respondent of any liability for its negligence in repairing the equipment, but entirely evaded the issue by erroneously stating that of the acts of negligence charged, "no one of them is an act of negligence on the part of the defendant in making repairs" (R. 83). This statement was not in keeping with the

record (R. 20-21).

Thereafter, on the 19th day of November, 1941, the petitioners filed their Petition For Rehearing in the Circuit Court of Appeals, which was overruled on the 26th day of November, 1941. (R. 89).

Under the state of the record brought up on appeal, it stands admitted: (1) that these petitioners lost their building and its contents as the result of a fire directly caused by respondent's negligence; (2) that such negligence was, in part at least, committed by the respondent while engaged in repairing the equipment; and (3) that the verdict of the jury was sustained by the introduction of substantial testimony showing such negligence on the part of the respondent.

Under the state of the record brought up on appeal, it stands undenied: (1) that, as the District Judge pointed out in his memorandum, the parties have collaborated in so framing the pleadings that the issue of law involved is clearly presented; and (2) that these instruments executed by the parties made no provision for releasing the respondent from its liability for its negligence committed while engaged in making repairs.

The sole basis for depriving these petitioners of compensation for the loss which they sustained lies in the fact: (1) that the Court of Appeals sought to dispose of this case upon the question of the manner in which the allegation of negligence was pleaded, rather than whether such negligence was pleaded; (2) that in doing this, the Court of Appeals attempted a thoroughly extreme and technical construction of the pleadings, rather that that authorized by the federal rules governing civil procedure; and (3) that in arriving at its unnatural construction of the pleadings, the Court of Appeals refused to accept the construction placed upon the pleadings by the parties to the suit and

by the trial court after collaborating upon the issues in a pretrial conference.

B.

Basis of Jurisdiction.

The jurisdiction of this Court is urged under Section 240 of the Judicial Code as amended by an Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937-938 (U. S. Code Annotated, Title 28, Section 347, and particularly Section 347a thereof); and under Revised Rules of the Supreme Court of the United States, subdivision (b) of paragraph 5 of Rule 38.

C.

Questions Presented.

The petitioners respectfully urge the following questions arising under this decision:

(1) Can the Court of Appeals, *for the purpose of passing upon the Motion For Judgment on the Pleadings, refuse to accept as true the allegation in the amended petition* that "said defendant carelessly and negligently . . . *repaired* . . . said equipment and that such negligence was in part as follows, to-wit: . . . C. the defendant failed properly to connect and insulate the exposed wires leading from plaintiffs' building to the motors located in defendant's pumps and failed to properly tape and insulate the exposed wires and failed to make a proper connection between said wires and the motors in defendant's pumps"?

(2) Inasmuch as the petition pleads conjunctively that "said defendant carelessly and negligently installed, *repaired* and altered said equipment" and that "such negligence was, in part, as follows, to-wit: . . . C. the

defendant failed properly to connect and insulate the exposed wires . . . ", can the Court of Appeals, after the trial of the case but without the record of the testimony before it, arbitrarily and, in fact, contrary to the evidence in the case, in ruling upon the Motion For Judgment on the Pleadings, say that in its opinion the allegation in the petition that respondent failed "properly to connect and insulate the exposed wires", referred alone to the installing of the equipment and not to the repairing of it?

(3) After having set out in its own opinion that portion of the amended petition pleading negligence while making repairs, can the Court of Appeals, in passing upon the Motion For Judgment on the Pleadings, arbitrarily refuse to accept the construction put upon the pleadings at the pretrial conference by both the parties to the suit and by the Trial Judge as evidenced by his memorandum in ruling upon the sufficiency of the pleadings concerning respondent's "obligation to make repairs" (R. 55), and can the Court of Appeals thereafter say of these same allegations that "no one of them is an act of negligence on the part of the defendant in making repairs" without so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

D.

Reasons Relied On For The Allowance Of The Writ.

(1) It is true that there are six specific grounds of negligence alleged, and it is also true that these six acts of negligence are alleged to have been committed while "said defendant carelessly and negligently installed, repaired and altered said equipment". It is not true, however, that this amounted to a general allegation of neg-

ligence followed by six specific acts of negligence, as stated by the Circuit Court of Appeals (R. 83). What is referred to by the Court of Appeals as a "general" allegation of negligence is nothing but a preliminary statement preceding the specific acts of negligence, applicable alike to each of these specific acts of negligence, and stating what respondent was engaged in doing when it committed this negligence. The opinion does not state that the petition fails to *allege* that these acts of negligence were committed in making repairs; the Court of Appeals simply says that *they are not* acts "of negligence on the part of the defendant in making repairs." This constituted a plain refusal on the part of the Circuit Court of Appeals, in determining the Motion For Judgment on the Pleadings, to accept as true all material allegations set up in the petition, and, therefore, presented a sharp conflict with the rulings of the other United States Circuit Courts of Appeal on the same matter.

(2) There was no way for the Court of Appeals, without having the transcript of the testimony before it, to tell whether each specific act of negligence referred to the installing or the repairing or the altering of the equipment. In fact, the only other place in the amended petition where the wiring was mentioned was in paragraph 5 (R. 20), where it was alleged that "after said equipment was installed and had been operating for several days", the present respondent "did disconnect, connect and change the position of the wires located" in the "vapor proof box containing the wires and switches on one of the pumps". Failure of the Court of Appeals in passing upon the Motion For Judgment on the Pleadings to view the petition as a whole and to accept as true all of the material allegations therein, constituted a determination of the

merits of the case rather than a determination of the sufficiency of the pleadings to state a cause of action.

(3) Both parties presented the case to the trial court upon the theory that the amended petitions alleged that negligence was committed by the respondent *in repairing* the electrical wiring. Under this construction of the pleadings the issue of law then was: Do the instruments set up in the answer, and admitted in the reply, relieve the respondent of any responsibility for its negligence *in repairing* the equipment? Since the record shows that, in the words of the Trial Judge, "The parties have collaboratedrated in so framing the pleadings (pendings) that the issue of law involved is clearly presented" (R. p. 55), the parties were entitled to have the Circuit Court of Appeals pass upon that issue of law—not to go off at a tangent on the question of whether that issue of law was, in fact, ever raised. In refusing to accept the construction which both parties and the District Court put upon the pleadings in the pretrial conference and which the trial court in its memorandum (R. p. 55) adhered to in passing upon "the issue of law involved", the Circuit Court of Appeals for the Eighth Circuit has gone a long way toward jeopardizing the informality and usefulness of the pretrial conference as a means of determining the issue of law involved and as a means of having it ruled upon by the court without the parties being afraid of later entrapment on technical questions of pleading. To that extent this erroneous opinion of the Eighth Circuit Court of Appeals is of great general importance; and by taking jurisdiction in the present certiorari proceeding this Court may put to rest for all time the claim that a circuit court of appeals by placing an unexpected construction upon the pleadings may render collaboration of the parties and the trial court in a pretrial conference on framing the pleadings to raise the issues of

law, a futile and exceedingly dangerous procedure for the pleader who assumes that it is substance and not formality of statement which counts in pleading under our new rules of federal procedure.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of Sinclair Refining Company, a corporation, Appellant, vs. J. E. Stevens and McKay Stevens, Appellees, No. 19964, to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States, and that the findings of said United States Circuit Court of Appeals for the Eighth Circuit to which petitioners have objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

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